U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

April 7, 2017

By ECF

Hon. P. Kevin Castel
United States District Judge
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: United States v. Albert Baratov, 15 Cr. 421 (PKC)

Dear Judge Castel:

The Government respectfully submits this letter in response to the letter of defense counsel Albert Y. Dayan, Esq., dated April 4, 2017, which the defense asks be treated as a motion pursuant to 28 U.S.C. § 2255.

While the Government believes that an argument could be made here that defendant Baratov waived any right to challenge a sentence below the 63-to-78 month Sentencing Guidelines range stipulated to in the plea agreement, the Government is electing here not to enforce that waiver. For the reasons set forth below, the Government consents to the granting of defendant's § 2255 motion, to the extent of correcting the Sentencing Guidelines range to 46-to-57 months, and having the defendant resentenced accordingly.

A. Factual Background

The fundamental facts are not in dispute.

1. Plea Agreement

Pursuant to a Plea Agreement, defendant Baratov pleaded guilty on July 1, 2015 to a one-count information (the "Information"), charging him with a violation of Title 18, United States Code, Section 1349, based on his participation in a conspiracy to make fraudulent loan applications to federally insured banks.

In the Plea Agreement (Attachment A hereto), the parties stipulated that defendant Baratov's offense level was 24 and his Criminal History Category was III, yielding an applicable sentencing range of 63 to 78 months.

Defendant Baratov further agreed in the Plea Agreement

> that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence within or below the Stipulated Guidelines Range of 63 to 78 months' imprisonment. . . This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein.

Plea Agreement at p.4.

2. Sentencing

At sentencing, the parties agreed to one change in the stipulations set forth in the Plea Agreement. Based upon some unsettled factual issues regarding one of defendant Baratov's prior arrests, the parties agreed that Baratov's Criminal History should be reduced to Category II. The Court adopted this finding (*see* Judgment at p.8, Statement of Reasons, ¶ I.B.3) and sentenced Baratov accordingly, applying an applicable sentencing range of 57 to 71 months. (*Id.* at ¶ III.)

The Court then applied a downward variance, sentencing the defendant below the applicable sentencing range, primarily to 46 months' imprisonment. (*See* Judgment at p. 10; Statement of Reasons, ¶ VI.)

3. Amendment to U.S.S.G. § 2B1.1, effective November 1, 2015

The offense level of 24 stipulated to in the Plea Agreement was based in part on the parties' agreement that the amount of the loss was $2.8 million, as reflected in the PSR. At the time that the Plea Agreement was signed in July 2015, that loss amount resulted in an 18-level upward adjustment, pursuant to U.S.S.G. § 2B1.1(J) (2014 ed.), which governed losses of between $2.5 million and $7 million.

However, by the time of defendant's sentencing in January 2016, § 2B1.1 had been amended. Had the amended Guideline been applied, defendant would have received only a 16-level upward adjustment, pursuant to U.S.S.G. § 2B1.1(I) (2015 ed.), which governed losses of between $1.5 million and $3.5 million. Had this amended Guideline been applied, the defendant's adjusted offense level would have been Level 22. With Criminal History Category II, defendant's applicable sentencing range would have been 46 to 57 months' imprisonment.

B. Analysis

On the present record, it appears that defense counsel should have argued at sentencing that the amended Guideline should be applied. It also appears that the Government would have consented to application of the amended Guideline, as is the general practice of this Office in these particular circumstances. The application of the amended guideline would have resulted in an applicable sentencing range of 46-57 months' imprisonment.

Needless to say, even under that lower Guidelines range, the Court would still have been free to impose the 48-month sentence that the Court originally imposed. By the same token, however, the Court would also have been free to apply a downward variance, as it did at the original sentencing.

Under these circumstances, the Government does not object to a resentencing of the defendant.

C. Potential Waiver Issues and Government Consent

As noted above, the Government believes that it could make a colorable argument that in the Plea Agreement the defendant waived his right to raise the instant argument in a motion pursuant to 28 U.S.C. § 2255. That argument is tempered here, however, by defense counsel's profession of error, which appears to be supported by the record.

Similarly, the Government could potentially argue here that the instant § 2255 motion is untimely. Again, however, the Government would come up against defense counsel's admissions of error.

In light of the full record here, and the sound basis of defendant's substantive claim, the Government does not object to a granting of the instant motion insofar as it seeks a two-level downward adjustment of his adjusted offense level and a resentencing.

Respectfully submitted,

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cc: Albert Dayan, Esq., by ECF